REPORT
ON
SECTION 183 OF THE INSURANCE ACT

ONTARIO LAW REFORM COMMISSION

1968

DEPARTMENT OF THE ATTORNEY GENERAL

The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964*, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. Allan Leal, Q.C., LL.M., LL.D., *Chairman*
Honourable James C. McRuer, S.M., LL.D.
Honourable Richard A. Bell, P.C., Q.C.
W. Gibson Gray, Q.C.
William R. Poole, Q.C.

Dr. Richard Gosse, Q.C., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada.

ONTARIO

ONTARIO LAW REFORM COMMISSION

PARLIAMENT BUILDINGS
TORONTO 2

To The Honourable A. A. Wishart, Q.C.,

Minister of Justice and
Attorney General for Ontario.

Re: *The Insurance Act*, R.S.O. 1960,
c. 190, s. 183 as amended
Stat. of Ont. 1961-62, c. 63, s. 4.

Dear Mr. Attorney:

As a result of representations made to us by a judge of the Supreme Court of Ontario, the Commission has reviewed the provisions of section 183 of *The Insurance Act*, R.S.O. 1960, c. 190, as amended by Statutes of Ontario, 1961-62, c. 63 and submits this report. Criticism of the existing provisions is well founded and remedial legislation is needed.

These provisions deal with the situation where the insured by the original contract or a subsequent instrument signed by him and delivered to the insurer has elected one of the settlement options offered by the insurer whereby, on maturity of the contract, the capital sum representing the proceeds of the policy is left with the insurer to be paid to the beneficiary in instalments. Since the rate of interest guaranteed payable by the insurer has to be one that is viable over long periods through cycles of cheap and dear money, it is set at a very low figure. The contract then provides that the insurer shall pay such additional rates of interest as are authorized by the company from time to time. In the specific case under review the guaranteed rate of interest was 2½ percent and at the material date the company was actually paying 4¼ percent.

We are informed that in recent years increasing resort has been made to the settlement options in stipulating the mode in which insurance proceeds are to be payable under non-commutable instalments. In some cases due to the relatively small amount of the instalments and

the dire economic circumstances of the beneficiary real hardship can result unless the court is empowered to grant relief from the strictures of the arrangement. This relief was available prior to 1962. It no longer exists in effective form.

The precursor of the existing section 183 (R.S.O. 1960, s. 181) reads as follows:

> "181.—(1) Where the insurance money is payable in instalments and the contract, or an instrument in writing signed by the insured and delivered to the insurer, expressly provides that the beneficiary does not have the right to commute the instalments or to alienate or assign his interest therein, the insurer shall not commute the instalments or pay them to any person other than the beneficiary, and the instalments are not in the hands of the insurer, subject to legal process except in an action to recover for necessaries supplied to the beneficiary or his or her infant children.
>
> (2) Notwithstanding subsection 1,
>
> (*a*) the insured may, by an instrument in writing signed by him and delivered to the insurer, declare that the beneficiary has the right to commute, or alienate or assign, as the case may be;
>
> (*b*) the court may, upon the application of the insurer or the beneficiary, upon at least ten days notice, declare that in view of special circumstances the beneficiary has the right to commute, or alienate or assign, as the case may be;
>
> (*c*) after the death of the beneficiary, his personal representatives may commute any instalments payable to them."

The section thus contains a spendthrift trust provision adopted from the American law at the time that insurers in this province began to offer life insurance policies with settlement options. The provision was a prohibition against commutation and a restraint on alienation presumably for the protection of the beneficiary. The normal rule in Anglo-Canadian jurisprudence is that a beneficiary who is *sui juris* and the sole absolute owner of a vested and indefeasible interest is entitled to call down the corpus: *Saunders* v. *Vautier* (1841), 4 Beav. 115 affirmed Cr. & Ph. 240.

The only exceptions permitted under the statute are:

(i) actions to recover for necessaries supplied to the beneficiary or his or her infant children (a provision for the protection of the beneficiary who might otherwise be unable to secure credit);

(ii) a subsequent declaration in writing by the insured;

(iii) a court declaration, upon the application of the *insurer or beneficiary*, made in view of special circumstances; and

(iv) after the death of the beneficiary, a commutation by his personal representatives of any instalments payable to them.

It is clear from the provisions of the former section 181 (2) (*b*) that the court had a discretion in special circumstances to declare that the beneficiary had the right to commute. In reviewing the cases decided under this section (and there are not many) one has very serious doubts as to whether the insured had any idea what he was about since the meagre sums involved made the election of a settlement option of instalment payments most unwise. For example, in *Re Bales Estate, Bales* v. *Mutual Life Insurance Company of Canada* (1960), 32 W.W.R. 670 the settlement option designated by the insured resulted in an instalment payment to his widow and three dependent children of $23.96 per month. Her total monthly income amounted to $39.96. To prevent commutation in these circumstances on some supposed ground that this is what the insured intended would be to carry the principle of the sanctity of contracts to an absurdity. Under the then existing legislation the court was empowered to intervene on application by the beneficiary and did intervene to direct the payment of a capital sum.

The situation under the 1962 amendments to *The Insurance Act* is far less satisfactory. The new section provides as follows:

"183.—(1) Subject to subsections 2 and 3, where insurance money is payable in instalments and a contract, or an instrument signed by the insured and delivered to the insurer, provides that a beneficiary has not the right to commute the instalments or to alienate or assign his interest therein, the insurer shall not, unless the insured subsequently directs otherwise in writing, commute the instalments or pay them to any person other than the beneficiary, and the instalments are not, in the hands of the insurer, subject to any legal process except an action to recover the value of necessaries supplied to the beneficiary or his infant children.

(2) A court may, upon the application of a beneficiary and upon at least ten days notice, declare that in view of special circumstances,

(*a*) the insurer may, with the consent of the beneficiary, commute instalments of insurance money; or

(*b*) the beneficiary may alienate or assign his interest in the insurance money.

(3) After the death of the beneficiary, his personal representative may, with the consent of the insurer, commute any instalments of insurance money payable to the beneficiary."

It will be noted that whereas under the former section the court was empowered in *proper* circumstances to declare that the beneficiary had the right to commute and to direct the commutation, under the amendment the consent of the insurer is required. Similarly under the provisions of the new subsection (3) the personal representatives of a beneficiary have lost the right to commute since the consent of the insurer is now required. The refusal of the insurer to permit commutation even in cases where the court deems it fair and just to allow it is the cause of dissatisfaction with the present provision.

We have sought evidence for the reason of this particular substantive amendment in 1962. The appendix to the resolutions arising out of the 1959 Report of the Standing Committee on Life Insurance Legislation of the Association of Superintendents of Insurance of the Provinces of Canada contains the following observations on section 183:

> "NOTE — This section is similar to present section [181 Ontario], except that clause *a* of present subsection 2 has been dropped as the point covered therein can be dealt with in the contract. In subsection 2, *supra* [new 183 (2) Ontario], the present provision is revised to make it clear that the court is merely declaring that commutation may take place; the parties must then agree on the basis of the commutation, *if they are able to do so* [Emphasis added]. In subsection 3 the words 'with the consent of the insurer' have been added for a similar reason."

In a monograph entitled *The Uniform Life Insurance Act of the Canadian Provinces*, published in May, 1962 just prior to the coming into force of the new Part V — Life Insurance on July 1, 1962, Mr. John A. Tuck, Q.C., Managing Director and General Counsel, The Canadian Life Insurance Officers Association, in commenting on the proposed section 183 (2) said:

> "This subsection gives the court power to declare in special circumstances the insurer may, with the consent of the beneficiary, commute the instalments or the beneficiary may transfer the payments to someone else. The application for an order of the court must be made by the beneficiary. *Note that the insurer is not required to commute but merely authorized to do so* [Emphasis added]. This is because the commutation may amount to a variation of the contract and therefore the parties must be in agreement on the change."

In commenting on the proposed section 183 (3) it was stated:

> "After the beneficiary has died his personal representative and the insurer may agree to a commutation."

We have been unable to find any other evidence of reasons purporting to support these changes. The reasons given do not justify the changes and permit a rigorous attitude to be adopted by the insurer in circumstances where real hardship can result to the beneficiary.

Another matter involving this section which has been brought to our attention has reference to the question whether a partial commutation is permissible and, if so, whether partial commutations can properly be made from time to time. Neither the former section 181 nor the present section 183 is entirely clear on this point. It was suggested in *Re Crown Life Insurance Company and Keays*, [1947] O.W.N. 273 at 275 that the section permitted but a single application. This interpretation leads to unsatisfactory results and, indeed, may prejudice both the insurer and the beneficiary. The section should be reworded to avoid this result.

Accordingly we recommend as follows:

(i) That section 183 (2) be amended to restore the original wording which would empower the court in special circumstances on the application of the beneficiary to declare that the beneficiary may commute without the consent of the insurer;

(ii) That section 183 (3) be amended to restore the original wording giving the personal representative of a beneficiary the right to commute without the consent of the insurer; and

(iii) That section 183 be amended to make it clear that the power to permit commutation in special circumstances is a power which can be exercised from time to time.

All of which is respectfully submitted,

H. ALLAN LEAL,
Chairman.

JAMES C. McRUER,
Commissioner.

RICHARD A. BELL,
Commissioner.

W. GIBSON GRAY,
Commissioner.

WILLIAM R. POOLE,
Commissioner.

October 3, 1968.